In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOHN FITZPATRICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 499.

BRIEF FOR THE UNITED STATES.

STATEMENT.

THE CASE.

At the May term, 1898, of the district court for Alaska, John Fitzpatrick was jointly indicted with Henry Brooks and William Corbett, charged with the murder of Samuel Roberts on March 13, 1898, at Dyea. After a demurrer to the indictment, which was overruled, and a motion for continuance, which was denied, separate trials were demanded by Brooks and Corbett. Fitzpatrick was first tried, and on June 1, 1898, found guilty

"without capital punishment." Thereupon he was sentenced to be imprisoned at hard labor for life in the penitentiary at San Quentin, Cal.

THE FACTS.

The entire testimony given on the trial appears in the record, pages 43 to 102, inclusive. It is brief, to the point, and vividly presents a tragedy not without interest.

The murder took place in Dyea, Alaska, just outside of the cabin of Roberts. Roberts ran the games at the Wonder Hotel or saloon and slept in his cabin across the street about 150 feet from the saloon. The cabin was a small wooden building 12 by 12 feet, with one door and one window fronting the street and the Wonder Saloon. The approach to the door was by steps and a small platform. The cabin stood back 100 feet from the street in a clearing containing a good deal of lumber, some piled, other scattered about. Ross and Brennan, two of the witnesses for the Government, were employed by Roberts in connection with the games. Brooke, a witness for the Government, was a sailor who happened to be in the Wonder Hotel at the time of the murder. Taylor, another witness for the Government, was night watchman in the street in front of the Olympia Hotel, about two blocks from the Wonder. Ballard, another witness for the Government, was a regular soldier on guard that night not a great distance from Roberts's cabin. Doll, another witness for the Government, was a teamster and stable boss, who worked not a great way

from Roberts's cabin and passed it the night of the murder on his way home. Cudihee, another witness, was the deputy United States marshal who arrested the accused and examined the premises and investigated the crime. Dr. Price was a physician at Dyea, who examined Roberts's body after his death, and also attended Corbett, who was shot that night. These were the leading witnesses for the prosecution.

John K. Ross testified that about 2 o'clock on the morning of March 13, 1898, Roberts, the deceased, asked the witness to accompany him from the Wonder Hotel to his cabin and carry a sack containing the money used at the games. This sack weighed between 40 and 50 pounds. Roberts was in the habit of going to his cabin every night accompanied thus by a man carrying the sack. Sometimes one employee did this, sometimes another. The witness and deceased proceeded to the cabin. They went up the steps, Roberts unlocked and opened the door, and both stepped inside. Roberts struck a match, or rather two, and while the sulphur was burning on these matches they heard the rustle of a piece of tin and Roberts cast his eyes toward the witness, as much as to say, something is wrong. Both stepped out of the door. Instantly there was a report of a gun inside of the cabin. Roberts crowded witness off the porch. The sack of money fell off the witness's shoulder and he fell off the steps. As he was falling, Roberts got to the ground and was standing with a gun in his hand facing the cabin door and backing away. *Just as witness hit the ground he heard a report of a pistol from the outside of the cabin and soon heard*

hurried footsteps pass close to him. He then heard the report of a gun from the inside of the cabin. In a few seconds a man came out from the inside of the cabin, stood on the porch, *raised his gun quite high, and fired two shots in the direction of the Wonder Hotel,* turned to the right in a leisurely manner, got off the steps and disappeared behind the north side of the house. *The witness recognized this man as John Fitzpatrick, the defendant.* On cross-examination (Record, p. 52) witness stated that while the night was dark he identified Fitzpatrick by the flash of the pistol shots. As Fitzpatrick disappeared the witness called for help, and presently Brennan and others came over from the hotel with a lantern. Roberts was found lying on his back, his feet toward the cabin door. He gave a gasp and died.

Terry Brennan testified that he was working at the games with Roberts; that about 2 o'clock the morning of March 13, after they had got through, he went to the stove and sat down and commenced reading, when Roberts called him to the door and said, "What are these lights burning over here in the foothills," and witness said he supposed they were people going inside. Roberts says, "Klondikers?" and witness said, "I suppose so," and went and sat down by the stove and resumed reading. Roberts then asked Ross to get the sack and accompany him to the cabin; which Ross did, and started over with him. In a few minutes witness heard a shot and started toward the door, but before he got to the door there was another shot, and when he got outside on the pavement there was another shot, and then he commenced to call to Roberts. Getting no answer, he commenced to call to

Ross, and he didn't get any answer, and then he started toward the cabin, and there were two shots fired, and he turned around and fled. Witness was then about 15 or 20 feet from Roberts's cabin. *The shots came from the cabin.* Witness then ran back to the hotel, got a gun, took a lantern, and ran straight across, the crowd following him. He found Ross first, then the sack of money at the foot of the steps, and then Roberts, on his back, dying.

John Lewis Brooke, who had been employed on the battleship *Oregon* and then on the *Concord*, testified that he saw Roberts at the Wonder Hotel the morning of March 13, just as he was getting ready to go over to his cabin. He walked out of the house. Two or three minutes after he left the house the witness heard a shot and got up and ran out toward the place, and he heard two more shots fired, *and a man ran toward him*, and then turned around like that. This was a slight-built man. He was running away. There was a light from the hotel, from the window, and there was a streak from there over to the corner, and witness saw him probably three or four seconds. The witness and Brennan found Roberts 15 feet away from the steps dead. The money was lying 3 or 4 feet from the steps. The shots, two of them, came from the door of the cabin straight toward witness.

It appears on cross-examination that the witness and others had started from the hotel to the cabin, but were turned back by the last two shots.

Leroy W. Taylor was night watchman at the Olympia Hotel on the night of March 13. The Wonder saloon was two blocks from the Olympia. The witness was in

the street in front of the Olympia all night. Between 2 and 3 o'clock in the morning *he saw a man run up the street right opposite to where he was, go over to a lumber pile and then join two other men on the other side of the lumber yard and then continue on up the street the other side of the lumber yard.* Just previously, the witness heard shots from the direction of the Wonder Hotel saloon, three or four altogether. The men came from the direction of the Wonder saloon and Roberts's cabin.

Phillip Ballard testified that he was a regular soldier on guard duty the morning of March 13. About 2 o'clock that morning he heard four or five shots from the direction of Roberts's cabin and the Wonder saloon. *Fifteen or twenty minutes, or half an hour after the firing, a man came to the cabin where witness was, rapped at the door, which witness opened, and said to witness that he would like to get a doctor; he was shot.* Witness directed this man to the hospital in town, and he went that way. Witness was afterwards told that this man's name was Corbett. Corbett was brought into court and identified by the witness, but not very clearly, however.

Dr. T. L. Price testified that he was a physician and surgeon; that he examined the body of Roberts on March 13, and found a bullet wound in the right breast, diagonally across the chest, penetrating the lungs and heart and coming out back of the left shoulder. This witness also testified that *about 3 o'clock on the morning of the 13th of March he was called to the Skagit saloon and found Corbett with a wound in his right shoulder.* He sent Corbett to the hospital and attended him for three weeks or a month.

Charles Doll testified that he was a teamster and stable boss for Dock Cleveland. About 12 o'clock on the evening of the 12th and morning of the 13th of March the witness was going home from his work and passed the Roberts cabin. *He saw two men standing in the door and partly on the platform and recognized Fitzpatrick as one of them.* Witness recognized him by flashing his lantern on him.

On cross-examination the witness stated that he recognized the man with Fitzpatrick at the cabin that night as Brooks, jointly indicted with him. Fitzpatrick was dressed in a yellow Mackinaw suit, with a leather belt and buckle in front and a fur cap on. The other man had a dark suit on.

John Cudihee, deputy United States marshal at Dyea, testified that he arrested Fitzpatrick, Brooks, and Corbett the day of the murder and made an investigation. He found Roberts in his cabin dead. Then he went to Fitzpatrick's and Corbett's cabin. *He found there a lot of shoes and clothing covered with blood. The witness produced the shoes in evidence, pointed out which pair was Fitzpatrick's and which was Corbett's, explaining that Fitzpatrick had identified the shoes in his office and pointed out which pair was Corbett's and which was his.* The witness also pointed out the blood stains on both shoes. Corbett's shoe fitted the footprint which the witness found in the rear of Roberts's cabin, perfectly. The shoe had hobnails in it, and the heel was worn off so the print in the sand was a peculiar one. In Roberts's cabin there was a table standing between the

cabin door and the window, and there was a mark where a bullet, afterwards found in the cabin, went through the table and struck the casing of the door. This was on the inside. The curtain at the window was cut across about an inch and a half on top and then ripped down about 4 or 5 inches. The door in the cabin was at the left and swung to the right when opened. The window was to the right of the door. The footmark, which Corbett's shoe fitted perfectly, was at the corner of the cabin where there was a pile of lumber. It was as if Corbett had sat on the pile of lumber looking around the corner and across to the Wonder saloon. One bullet was found in Roberts's clothes and another inside of Roberts's cabin.

For the defense, Fitzpatrick took the stand and swore to an alibi. His testimony will be commented on later. The only additional testimony offered in Fitzpatrick's behalf was a calendar of March, 1898, as it appears in Ayer's Almanac, the affidavit of Corbett and Brooks giving their whereabouts on the evening of the 12th and the morning of the 13th of March, and an affidavit of Mary Dickson with reference to the reputation and character of Fitzpatrick.

In rebuttal, the Government introduced Deputy Marshal Snook, with respect to Fitzpatrick's reputation in Dyea, and Captain Young, of the United States Marine Corps, and Dr. White, of the United States Navy, with respect to the possibility of recognizing a man by the flash of a revolver at night.

ARGUMENT.

I.

INDICTMENT SUFFICIENT.

It is contended that under the act of May 17, 1884, providing a civil government for Alaska, the general laws of Oregon are declared to be the law of Alaska, so far as the same may be applicable, and that tested by the law of Oregon the indictment is insufficient, because it does not charge the crime of killing *eo nomine*, or as done with deliberate malice.

The law of Oregon grades murder, dividing it into murder in the first degree and murder in the second degree. Murder in the first degree is thus defined:

> If any person shall purposely, and of deliberate and premeditated malice, or in the commission or attempt to commit any rape, arson, robbery, or burglary, kill another, such person shall be deemed guilty of murder in the first degree. (Sec. 1714, Hill's Annotated Laws of Oregon, 1892, Vol. 1, p. 889.)

If Fitzpatrick had been indicted under this section, it would not have been necessary to charge him with "deliberate and premeditated malice." It would have been sufficient, in view of the facts of the case, to charge him with killing Roberts purposely "in the commission or attempt to commit a robbery or burglary." But Fitzpatrick was not indicted or punished under the law of Oregon defining murder. He was indicted under section

5339 of the Revised Statutes of the United States, which provides that:

> Every person who commits murder * * * in any place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death.

Following the law of Oregon relating to criminal procedure, an indictment must contain—

1. "The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

2. "A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." (Hill's Anno. Laws of Oregon, sec. 1268, p. 768.)

In *State* v. *Dougherty* (4 Oreg., 209), and in numerous other cases, the supreme court of Oregon has held that under this section—

> The indictment should always contain such a specification of acts and descriptive circumstances as will upon its face fix and determine the identity of the offense, and enable the court by an inspection of the record alone to determine whether, admitting the truth of the specified acts charged, a thing has been done which is forbidden by law.

Section 1270 (Hill's Stat., p. 769), cited by opposing counsel, relates to the manner of stating the acts constituting the crime and provides:

> The manner of stating the act constituting the crime, as set forth in the appendix to this code, is sufficient in all cases where the forms there given

are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit.

It is true that in the appendix the following form is given for an indictment for murder:

> Purposely and of deliberate and premeditated malice killed C D by (shooting him with a gun or pistol, or, etc.).

It will be observed that section 1270 merely says that the manner of stating the crime as set forth in the appendix "is sufficient." It does not state that any other manner is insufficient. The form in the appendix is directory and not mandatory. The crime may be properly charged with greater particularity. The object of the Oregon provision was to relieve and not to embarrass the pleader. To charge the crime of murder under the Federal statute and at the same time comply with the criminal procedure of Oregon, it is sufficient to give "a statement of the acts constituting the offense in ordinary and concise language in such manner as to enable a person of common understanding to know what is intended."

> The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and

> intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances. (Mr. Chief Justice Waite in *United States* v. *Cruikshank*, 92 U. S., 542, 558.)

The indictment in this case fully complies with all these requirements. It not only sets forth the acts, but the intent with which they were done.

The indictment charged that Fitzpatrick, Brooks, and Corbett did "feloniously, purposely, and of deliberate and premeditated malice" make an assault upon Roberts; and did "feloniously, purposely, and of deliberate and premeditated malice" discharge and shoot off a revolver, charged with gunpowder and leaden bullets, against and upon Roberts; and with a bullet fired from the revolver so discharged "feloniously, purposely, and of deliberate and premeditated malice" did strike, penetrate, and wound Roberts in the right breast, inflicting "one mortal wound, of which said mortal wound he, the said Samuel Roberts, instantly died." And so the jurors do say that Fitzpatrick, Brooks, and Corbett "did then and there kill and murder the said Samuel Roberts *in the manner and form aforesaid*," contrary, etc.

Is there any lack of intent here? The acts charged are alleged to have been done "feloniously, purposely, and of deliberate and premeditated malice." These acts are assaulting the deceased, shooting him, and inflicting upon him a mortal wound of which he instantly died; all being done purposely, feloniously, and of deliberate and premeditated malice. If this does not constitute murder, what does? If an indictment charges that the defendant feloniously, purposely, and of deliberate and

premeditated malice shot and killed the deceased, does it not sufficiently set forth the intent?

Of course there is a distinction between ordinary assault and assault with intent to kill. But the charge of feloniously, purposely, and of deliberate and premeditated malice, shooting and killing a man is equivalent to the charge of shooting him with intent to kill, and something more. A man who purposely inflicts a mortal wound does so with intent to kill and is guilty, where murder is graded, of murder in the second degree. But a man who purposely, *and of deliberate and premeditated malice* inflicts a mortal wound upon another, is guilty of murder in the first degree.

The indictment concludes by charging "That said John Fitzpatrick, Henry Brooks, and William Corbett did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid." What is "the manner and form aforesaid?" First, that they assaulted Roberts; second, that they shot him with a loaded revolver which they held in their hands; and, third, that with the bullet so discharged they inflicted upon Roberts a mortal wound, of which he instantly died; and in each case it is charged that this was done "feloniously, purposely, and of deliberate and premeditated malice." It is impossible to see what more can be required under the second paragraph of section 1268 of the Oregon Code. Certainly there is enough "to enable a person of common understanding to know what is intended."

II.

THE TESTIMONY RELATING TO CORBETT WAS CLEARLY COMPETENT, NOT FOR THE PURPOSE OF CONNECTING CORBETT WITH THE CRIME, BUT OF SHOWING THE ENTIRE TRANSACTION.

The defendant objects to the action of the court in admitting the testimony of Dr. Price and the soldier Ballard, who testified that, shortly after the shots on the night of the murder, Corbett applied to them for help, stating that he was shot; and the testimony of Marshal Cudihee that on the morning after the murder he went to the cabin occupied by Fitzpatrick and Corbett, found a lot of bloody clothes and shoes, and brought two pair of shoes with blood on them to Fitzpatrick, one pair of which he identified as Corbett's, and that one of Corbett's shoes fitted perfectly the footprint in the sand near the corner of the Roberts cabin. It is claimed that, as Corbett was a coconspirator, his acts and declarations after the commission of the crime can not, under the decision in the case of Sparf and Hanson (156 U. S., 51), be used against Fitzpatrick.

I concede that if Corbett had made a confession after the crime had been committed and the criminal transaction had ended, implicating Fitzpatrick, such declarations or admissions could not be used against Fitzpatrick, but no confessions or admissions of Corbett implicating Fitzpatrick were introduced. The statement of Corbett to Ballard that he was shot related in no way to Fitzpatrick. This statement was a part of the act of seeking medical assistance, and nothing more. It was simply a

statement that he was wounded. That he was wounded must be admitted. The importance of the testimony lay in the fact that a few minutes after the shooting had taken place, and within a short distance of the scene of the murder, at an unusual hour this man Corbett appeared to the witnesses with a wound in his right shoulder. It was the fact that Corbett was there at 3 o'clock in the morning in the immediate neighborhood of the murder, from which three persons had fled, wounded and seeking assistance, that was important.

Consider the circumstances. Fitzpatrick and Corbett roomed together. Their bloody clothes and shoes were found in their cabin the morning after the murder. Brooks had roomed with them. Brooks and Corbett, in their affidavit for a continuance (record, p. 14), in effect swear they were together that night; they attempt to establish a joint alibi. Fitzpatrick admits that the three of them were together between 7 and 8 o'clock the night of the murder. Between 12 and 1 o'clock that night Doll swears he saw and recognized Fitzpatrick and Brooks in the door of Roberts's cabin. Ross, who accompanied Roberts to the cabin, says the first shot was fired from inside the cabin. This bullet hit no one; it was found inside the cabin, according to Cudihee's testimony. The next shot came from outside the cabin, evidently from Roberts. Directly after it Ross *heard hurried footsteps pass close to him.* Part of the murderers fled then. Next, Ross heard the report of a gun from the inside of the cabin. This was the shot that "got" Roberts. In a few seconds Ross says a

man came from the inside of the cabin, raised his gun, fired twice in the direction of the Wonder Hotel to keep back the crowd that was rushing over from there, and then fled. This man was Fitzpatrick. Brooks saw a man running away from the cabin. Taylor, night watchman at the Olympia, two or three blocks from the Wonder, a few minutes after the shots were fired saw a man run up the street from the direction of Roberts's cabin, join two other men at a lumber pile, and then continue up the street.

Here is testimony enough to show that the murder was committed by three men, acting jointly; in other words, that there was a conspiracy. In convicting one of the principals in a murder like this, it is necessary and proper to lay before the jury the entire transaction, the acts and conduct of all who are engaged in the commission of the crime until the transaction is completely closed. Action immediately following a crime, which is caused by and is the direct result of the crime, is really a part of the transaction. Corbett's wounded condition directly after the murder was important, not as showing what he had said or done subsequent to the murder, but as proving that he was present at the murder. His presence at the murder was admissible in Fitzpatrick's case as a part of the actual transaction which had to be presented fully to the jury in order that they might understand the crime. In this case Corbett may be considered not as a man indicted and on trial for the crime, but as an animal, so associated with the accused that proof of its presence at the scene of the murder became material and relevant in determining the guilt of the accused. Let me illustrate the point.

Suppose Roberts had been held up by a highwayman, Fitzpatrick, who rode to the scene of the crime on horseback, but had dismounted when he made the assault upon Roberts. Suppose shots were exchanged, an alarm raised, and upon the arrival of help, the murderer fled, his horse going in one direction and he in another. Upon the examination of the ground the next morning a peculiar print made by a horseshoe was found. Would it not be perfectly competent to show that directly after the murder Fitzpatrick's horse was found wounded, not for the purpose of showing the horse committed the murder, but was *there* when the murder was committed? Would it not be competent to show that the next day it was found that a particular shoe worn by Fitzpatrick's horse fitted the mark at the scene of the murder perfectly?

Again, with reference to showing that Corbett, wounded, applied for help immediately after the murder. Suppose that Roberts had had a personal tussle with his assailants and had grabbed and held the cap of one of them. Would it not be competent to show that Corbett was seen a few minutes after the murder bareheaded, and to show that the cap clinched in Roberts's hands was Corbett's cap? In short, where several men are charged jointly with the commission of a crime it is competent, in establishing who were present, *to show what was left on the ground or carried away by any one of them*, no matter which of the principals is on trial. *In this case, Corbett left a footprint and carried away a wound.* He both left and carried away evidence of his presence there.

Let me refer to a few cases showing clearly that the testimony was competent.

The first case, that of *People* v. *Cleveland* (107 Mich., 367), is so directly in point and so fully answers the objections made in this case that I quote freely from it. Cleveland was informed against jointly with Robert Mehan and Frank Swidenski, for assault with intent to commit murder. He was tried separately. The evidence disclosed the fact that these three parties had driven in a carriage, hired by Swidenski, at Jackson, to the place of assault. The assault was made upon one Weatherwax, a storekeeper, who, after his store had been closed for the night, was called upon by a man who pretended he wanted to purchase cheese and crackers. Taking a lighted lamp in his hand, he went to his store and was preparing to get the cheese when he was confronted by two men, who, with drawn revolvers called upon him to throw up his hands. Instead of doing so Weatherwax attacked one of his assailants, striking him over the head with his lamp and extinguishing it. He continued striking his assailants over the head with the broken lamp until, although twice wounded, he escaped. At 1 o'clock the next morning Cleveland returned the horse and carriage hired by Swidenski. Mehan became separated from the other two and made his way to Jackson on foot. He was seen the next morning within 2 miles of the place of assault, going in the direction of Jackson. At that time he was without a hat, and had cut out the pocket of his coat, and drawn it over his head as a skull cap. These facts were proven on the

trial of Cleveland, over the objections and exceptions of his counsel, who insisted, among other things, there was error—

> In permitting the people to show the acts of Mehan after the affray, his appearance on the way to Jackson and on the succeeding days, the excuse he gave for his then condition, and the result of an examination of his clothing.

Answering that contention, the court said (p. 370):

> It is apparent from the testimony that the three parties, when they left Jackson, had arranged to engage in this robbery. We think there was evidence for the jury to determine the identity of the three on their way there, and there can be little question from the testimony that they were at the store, two of them entering it and one remaining outside. Mr. Weatherwax testified that he recognized respondent Cleveland as the masked man, and who fired one of the shots. By the proofs it was established that a prior arrangement had been made to commit the robbery, and the arrangement had been carried out so far as they were able to do so. It was therefore proper to show the condition of Mehan, who was not on trial, for the purpose of establishing his identity as one of the men who accompanied respondent Cleveland from Jackson to Somerset Center, thus identifying the latter's connection with the robbery. In the case of *Ryan* v. *State* (83 Wis., 486), the charge was burglary. Evidence was admitted, under objection, showing the movements and conduct of each of three persons charged with the crime on the next morning after the robbery, and after they had separated. The prosecution having shown that these persons were seen together shortly before the

> crime, this evidence was held competent. It is true that, when the subsequent facts sought to be shown are in the nature of a narrative by one of the parties to the transaction, such narration is inadmissible as evidence against a corespondent; but in the present case no such statements were sought to be shown, and it was competent to show the condition of any one of the three, immediately after the affray, which would throw any light upon the question of the identity of Cleveland as taking part in the crime charged. What Mehan said as to his condition, as shown by the testimony here, was in no manner prejudicial to the respondent, as its tendency would be to show that respondent was not in his company at the time he received his injuries. (Citing 71 Iowa, 11.)

So in *Ryan* v. *State* (83 Wis., 486), where Ryan was jointly charged with two others with the crime of burglary (and was tried separately), proof was given of the conduct and movements of the three persons charged with the burglary on the next morning after it was committed, and the connection of each of such persons with the goods stolen when the burglary was committed. This was assigned as error. The court, answering the contention, said (p. 492):

> There was testimony tending to show that the three accused parties were together recently before the burglary was committed, and some of them were after, and that each of them had some of the goods stolen from Welsh's house. We are of the opinion that such testimony was a sufficient basis for the admission of other testimony tending to show the conduct and movements of any or all the accused parties recently after the crime was committed.

> Under the circumstances which the testimony tends to prove, such recent conduct and movements were, in some sense, really parts of the *res gestæ*, and properly provable as such.

State v. *Struble* (71 Iowa, 11) was a case wherein Frank Struble was jointly indicted with Thomas Struble and John McBride for the crime of burglary, but was tried separately. Struble, having been convicted, assigned as error the admission of certain testimony relating to the acts of his co-conspirators after the burglary was committed. The court held this evidence proper, taken in connection with other testimony, as a circumstance tending to show the guilt of the parties, and that it was really a part of the transaction.

In *Angley* v. *State* (35 Texas Criminal Report, 427) Angley was separately indicted and tried for an assault with intent to rob, committed by himself and one Hess Rice. Upon the trial the court permitted a witness for the State to testify to the fact of his having seen Angley and Rice together, near the place of the assault, on the day of its commission, about daylight. The assault was committed about 2 o'clock in the afternoon. To the admission of this testimony Angley objected on the ground that it was too remote from the main fact—identity. The court, however, held this testimony proper, as a circumstance tending to show that the parties were in the neighborhood of the scene of the assault on that day.

Another ground of error was that the State was permitted to show the character of shoes Rice had on when arrested the day after the assault. One ground of the

objection was that Rice was not jointly indicted with Angley. After the assault the tracks of two men were found near the house; one being that of a No. 9 shoe and one of a No. 7 shoe. The track made by the No. 7 shoe was peculiar, in that it evidently had a hole in the bottom of the sole. When arrested, Angley was found to have worn a No. 9 shoe and Rice a No. 7. When Rice was arrested and his shoes examined, it was found that one of his shoes had a hole in the sole corresponding with the peculiarity in the track as found upon the ground.

The court held this testimony proper, although Rice was separately indicted, because the conspiracy had been shown, and this "was a circumstance tending to show that he was one of the parties present at the time the assault was committed, and as tending to corroborate the positive testimony of Mrs. Butler," the person assaulted (p. 134).

So, in this case, the testimony of the witnesses concerning Corbett, to which exceptions are taken, relates not to what was said by Corbett, but to his whereabouts, his condition, and conduct immediately after the commission of the crime, and is a circumstance proper to be shown as throwing light upon the entire transaction.

So, too, with respect to the testimony of Marshal Cudihee, as to the identity of the shoes found by him in Fitzpatrick's cabin the day after the murder. Fitzpatrick identified these shoes, not Corbett, and he can not complain if it is otherwise shown that the property he identified was present at the murder.

Further upon this point I refer the court to the cases of *State* v. *Shields*, 45 Conn., 256, 263; *Phelps* v. *State*,

15 Texas Appeals, 45; *Fisher* v. *Georgia*, 73 Ga., 595, 601.

III.

THERE WAS NO ERROR IN THE CROSS-EXAMINATION OF FITZPATRICK.

It is contended on behalf of Fitzpatrick that the court erred in permitting the prosecution to interrogate the defendant upon any point other than his whereabouts between the hours of 11 o'clock on the evening of the murder until the next morning.

The cross-examination as to the residence of witness in Dyea and his occupation there were merely preliminary; they were not objected to at the time, and their competency can not now be questioned. (*Benson* v. *United States*, 146 U. S., 332; *People* v. *Collins*, 48 Calif., 277); some of his answers were not responsive to the questions, and his answers in no way prejudiced his case. The answers themselves showed there was no prejudice; they were not contradicted by the Government, and the Government was bound by them; they were favorable to the prisoner; and this being true, the immateriality or propriety of the questions is of no importance, and furnish no ground for reversal on error (*Cochran* v. *United States*, 157 U. S., 286, 291).

Admitting for the sake of argument that it was improper to ask the witness if he had ever been convicted of any crime, his answer was that he had not. No attempt was made to contradict the statement and the Government was bound by his answer. It was in his

favor and he was in no way prejudiced by it. (*Cochran* v. *United States*, *supra*.)

Objection was made to the cross-examination of the witness as to the kind of clothes he had on the night of the murder, and as to whom he was with, what he was doing, and as to who had been at his cabin during the night. The court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited, and the company he was in. This, for the purpose of testing his credibility and to see what truth there was in his statements as to his movements. In this connection, and for this purpose, it was competent to show how he was dressed. If the contention of counsel for Fitzpatrick be correct, then really no cross-examination is permissible; all that can be done is to repeat, parrot like, the questions put to the witness in chief. It was proper to interrogate the witness as to his conduct, acts, and movements on the night of the murder, because those acts and movements are not distinct and separated from the crime. It had been shown that he had been with Brooks on the night of the murder. Corbett in his affidavit (Record, p. 14) for a continuance swore that he would prove by certain witnesses that he was at Kennedy's place on the night of March 12, and until 3 o'clock on the morning of the 13th. It had been admitted by counsel for the Government (Record, p. 43) that if the witnesses were present they would so testify. Fitzpatrick, in his examination in chief, admitted that he had been to Kennedy's about 1 o'clock on the morning of the 13th of March.

This admission was before the jury at the time of the cross-examination of Fitzpatrick. All this testimony bore directly on the main fact. It was proper, therefore, to permit the questions to be asked for the purpose of affecting the credibility of the witness, and they were asked for that purpose. (Record, p. 93.)

Turning to the case cited by opposing counsel in support of their interpretation of the rule, the first case cited is that of *Oregon* v. *Lurch* (12 Oreg., 99). Lurch was charged with uttering a forged note. He took the stand, admitted the signing of the note, but set up the fact that the person whose name appeared to the note had authorized him to sign the name thereto. On cross-examination Lurch was required to write his own name, the name of the person whose name he was charged with forging, both in his ordinary handwriting and as nearly as possible like it appeared on the note. This the court held to to be error. The issue raised by his answers was whether he had or had not been authorized to signed the note, he having admitted the signing. The signing of the names in no way threw any light upon whether he had been authorized. All it did and what it did was to show that he had, in writing the signature to the note, attempted to imitate the handwriting of the person whose name he had signed. This was compelling him to furnish mute evidence which would contradict his oral testimony; in other words, compelling him to furnish evidence to contradict himself.

In *State* v. *Saunders* (14 Oreg., 300) Saunders was charged with and convicted of murder. The defendant took the stand in his own behalf and gave his version of

the murder. On cross-examination he was asked if he had not killed a man in Texas, and other similar questions, which the court compelled him to answer, and to which he gave qualified affirmative answers. The Supreme Court held this to be error, because they formed no part of the crime and had no connection whatever with it.

Lord, C. J., concurring in the judgment of reversal, states his opinion of the rule in these words, bottom page 316:

> The general rule in respect to any witness on cross-examination is that he may be cross-examined as to any facts and circumstances testified to by him on his direct examination; and, personally, I have been inclined to think that our statute was but a mere reaffirmation of this rule as to the accused, and that when he voluntarily took the witness stand he subjected himself to the same tests as are applied to any other witness, and in the sound discretion of the trial court may be cross-examined as to collateral facts calculated to test his credibility.

State v. *Gallo* (18 Oreg., 123) was a case in which Gallo had been convicted of grand larceny. In his defense he testified that he, the complaining witness, and a third party had gambled for the money alleged to have been stolen, and that it had been won by the third party.

On cross-examination he was asked whether at the time he gambled for this money he did not have certain counterfeit and Brazilian money in his possession, whether he wagered good money, and if it was not a fact that he staked this counterfeit money. This was alleged to be

error. While the record did not disclose the answers given, the court, in disposing of the objection, said (p. 425):

> I am inclined to think that these questions do not fall within the objection successfully urged in *State* v. *Lurch*, 12 Or., and *State* v. *Saunders*, 14 Or., 302. The defendant had testified that he wagered $100 at the game. Whether he did so was a question for the jury, and if, by his cross-examination, the State could make it appear that what he did in fact wager was of no value it would tend to contradict him, and I think would be legitimate cross-examination.

IV.

THE TESTIMONY IN REBUTTAL.

As to the testimony of Deputy Marshal Snook respecting the reputation of Fitzpatrick at Dyea, it is sufficient to say that the defendant has put his reputation in issue by the introduction of the affidavit of Mary Dickson. (Record, p. 99.) It was competent for the Government then, on rebuttal, to show what his reputation was in the community where the crime was committed and at the time it was committed. Further, the question objected to was excluded, and no exceptions were taken to the other questions asked the witness.

Captain Young, although called as a witness, was not permitted to testify, so no prejudice resulted from anything he said.

As to the testimony of Dr. White with respect to the effect of light from the flash of a revolver at night, it is a sufficient answer to say that the defense had offered in evidence a calendar (Record, p. 97) for the purpose of

affecting the credibility of witnesses for the Government, and as showing the darkness of the night. His evidence was competent as showing that notwithstanding the character of the night, there was sufficient light from the flash of the revolver to identify a person by the flash.

V.

WAS FITZPATRICK CONVICTED OF A "CAPITAL CRIME?"

The act of March 3, 1891 (26 Stat., 826), as amended by the act of January 20, 1897 (29 Stat., 492), withdraws from this court the jurisdiction of criminal cases not capital, and confers the same on the circuit courts of appeal. This court has now jurisdiction only "in cases of conviction of a capital crime." It is a question not yet decided by this court whether a defendant is convicted of a capital crime where the jury, under the act of January 15, 1897 (29 Stat., 487), qualify their verdict by adding the words "without capital punishment," thus taking from the crime its capital character. Doubtless, a man indicted for murder under section 5339 United States Revised Statutes is *charged* with a capital crime. But is a man convicted of a capital crime when the jury, acting under the authority of the act of January 15, 1897, "to reduce the cases in which the penalty of death may be inflicted," qualified their verdict by adding thereto "without capital punishment," and thus attach to the particular crime the punishment defined by this act, which is that "the person convicted shall be sentenced to imprisonment at hard labor for life." As soon as the jury thus qualified their verdict the crime ceased to be a capital crime,

and under this statute became a crime with a clearly defined noncapital punishment, to wit, the punishment of imprisonment at hard labor for life.

The object of the act of January 20, 1897, was to relieve this court of the consideration of criminal cases except where, by reason of the conviction, the man's life was in jeopardy. In other words, only a man under sentence of death was to be permitted to carry his case directly to this court.

CONCLUSION.

The crime was a dastardly one—a clear case of lying in wait to rob. Fitzpatrick was tried fairly, convicted justly, and treated by the jury most leniently. Directly after his trial, Corbett and Brooks were tried and convicted (Record, pp. 27, 28). Almost two years have elapsed. The shifting character of the population of Alaska is well known. It is doubtful whether the Government could obtain its witnesses for another trial. This may explain the effort being made for a reversal. I fancy it is not so much a new trial that the plaintiff in error wants, as it is no trial. The objections urged are technical, if not trivial. If there were irregularities, which I do not concede, they were not prejudicial to Fitzpatrick. Substantial justice was done and the conviction should stand.

JOHN K. RICHARDS,
Solicitor-General.

MAY 7, 1900.

O

OPINION

FITZPATRICK *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

Submitted April 30, 1900. — Decided May 28, 1900.

Under the Court of Appeals Act of March 3, 1891, a conviction for murder is a "conviction of a capital crime," though the jury qualify their verdict of guilty by adding the words "without capital punishment." The test of a capital crime is not the punishment which is imposed, but that which may be imposed under the statute.

Under the statute of Oregon requiring the offence to be stated "in ordinary and concise language and in such manner as to enable a person of common understanding to know what was intended," an indictment for murder charging that the defendant feloniously, purposely, and of deliberate and premeditated malice inflicted upon the deceased a mortal wound of which he instantly died is a sufficient allegation of premeditated and deliberate malice in killing him.

Evidence that one jointly indicted with the defendant was found to have been wounded in the shoulder, and his accompanying statement that he had been shot, were held to be competent upon the trial of the defendant.

Any fact which had a bearing upon the question of defendant's guilt immediate or remote and occurring at any time before the incident was closed, was held proper for the consideration of the jury, although statements made by other defendants in his absence implicating him with the murder would not be competent.

The prisoner taking the stand in his own behalf and swearing to an alibi was held to have been properly cross-examined as to the clothing worn by him on the night of the murder, his acquaintance with the others jointly indicted with him, and other facts showing his connection with them.

Where an accused party waives his constitutional privilege of silence and takes the stand in his own behalf and makes his own statement, the prosecution has a right to cross-examine him upon such statement with

Statement of the Case.

the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime.
Evidence in rebuttal with respect to the effect of light from the flash of a revolver was held to be competent where the defence put in a calendar, apparently for the purpose of showing the time the moon rose that night.

THIS was a writ of error to review the conviction of Fitzpatrick, who was jointly indicted with Henry Brooks and William Corbett for the murder of Samuel Roberts, on March 13, 1898, at Dyea, in the Territory of Alaska.

The indictment, omitting the formal parts, was as follows:

"The said John Fitzpatrick, Henry Brooks and William Corbett at or near Dyea, within the said district of Alaska, and within the jurisdiction of this court, and under the exclusive jurisdiction of the United States, on the 13th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice make an assault upon one Samuel Roberts, and that they, the said John Fitzpatrick, Henry Brooks and William Corbett, a certain revolver, then and there charged with gunpowder and leaden bullets, which said revolver they, the said John Fitzpatrick, Henry Brooks and William Corbett, in their hands then and there had and held, then and there feloniously, purposely and of deliberate and premeditated malice did discharge and shoot off to, against and upon the said Samuel Roberts; and that said John Fitzpatrick, Henry Brooks and William Corbett with one of the bullets aforesaid out of the revolver aforesaid then and there by force of the gunpowder aforesaid by the said John Fitzpatrick, Henry Brooks and William Corbett, discharged and shot off as aforesaid then and there feloniously, purposely and with deliberate and premeditated malice did strike, penetrate and wound him, the said Samuel Roberts, in and upon the right breast of him, the said Samuel Roberts, then and there with the leaden bullet aforesaid so as aforesaid discharged and shot out of the revolver aforesaid by the said John Fitzpatrick, Henry Brooks and William Corbett, in and upon the right breast of him the said Samuel Roberts one

mortal wound, of which said mortal wound he, the said Samuel Roberts, instantly died, and so the grand jurors duly selected, empaneled, sworn and charged as aforesaid upon their oaths do say: That said John Fitzpatrick, Henry Brooks and William Corbett did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America.

"BURTON E. BENNETT,
"*U. S. District Attorney.*"

After a demurrer to the indictment, which was overruled, and a motion for a continuance, which was denied, Brooks and Corbett moved and obtained an order for separate trials. The court thereupon proceeded to the trial of Fitzpatrick, the jury returning a verdict of guilty "without capital punishment." Motions for a new trial and in arrest of judgment were entered, heard and overruled, and defendant sentenced to hard labor for life in the penitentiary at San Quentin, California. To review such judgment a writ of error was sued *in forma pauperis.*

Mr. A. B. Browne, *Mr. Julius Kahn* and *Mr. Alexander Britton* for plaintiff in error.

Mr. Solicitor General for the United States.

MR. JUSTICE BROWN, after making the above statement, delivered the opinion of the court.

1. A suggestion is made by the government of a want of jurisdiction in this case, upon the ground that it is not of a "conviction of a capital crime" within section five of the Court of Appeals act of March 3, 1891, c. 517, 26 Stat. 826, as amended by act of January 20, 1897, c. 68, 29 Stat. 492, specifying the cases in which a writ of error may be issued directly to a District Court. It is clear, however, that, as section 5339 of the Revised Statutes inflicts the penalty of death for murder, the power given

the jury by the act of January 15, 1897, c. 29, 29 Stat. 487, to qualify the verdict of guilty by adding the words "without capital punishment," does not make the crime of murder anything less than a capital offence, or a conviction for murder anything less than a conviction for a capital crime, by reason of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which *is* imposed, but that which *may be* imposed under the statute. As was observed in *In re Claasen*, 140 U. S. 200, 205, with respect to infamous crimes under the Court of Appeals act prior to its amendment: "A crime which is punishable by imprisonment in the state prison or penitentiary, as the crime of which the defendant was convicted, is an infamous crime whether the accused is or is not sentenced or put to hard labor; and that, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one." See also *Ex parte Wilson*, 114 U. S. 417, 426; *Logan* v. *United States*, 144 U. S. 263, 308; *The Paquete Habana*, 175 U. S. 677, 682; *Motes* v. *United States*, *post*. A conviction for murder, punishable with death, is not the less a conviction for a capital crime by reason of the fact that the jury, in a particular case, qualifies the punishment.

2. The first question raised by the plaintiff in error relates to the sufficiency of the indictment, which was for a violation of Rev. Stat., section 5339. This section, eliminating the immaterial clauses, declares that "every person who commits murder . . . within any fort . . . or in any other place or district of country under the exclusive jurisdiction of the United States . . . shall suffer death." This section does not define the crime of murder, but prescribes its punishment.

By section seven of an act providing a civil government for Alaska, approved May 17, 1884, c. 53, 23 Stat. 24, it is enacted "that the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." We are, therefore, to look to the law of Oregon and the interpretation put thereon

by the highest court of that State, as they stood on the day this act was passed, for the requisites for an indictment for murder rather than to the rules of the common law.

By Hill's Annotated Laws of Oregon, section 1268, c. 8, title 1, relating to criminal procedure, an indictment must contain:

"1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties;

"2. A statement of the acts constituting the offence, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended."

In *State* v. *Dougherty*, 4 Oregon, 200, 205, the Supreme Court of that State had held that "the indictment should always contain such a specification, of acts and descriptive circumstances as will, upon its face, fix and determine the identity of the offence, and enable the court, by an inspection of the record alone, to determine whether, admitting the truth of the specific acts charged, a thing has been done which is forbidden by law."

By section 1270, Hill's Laws, it is provided that "the manner of stating the act constituting the crime, as set forth in the appendix to this code, is sufficient, in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit;" and in an appendix to this section the following form is given for murder: "And purposely and of deliberate and premeditated malice killed C. D. by shooting him with a gun or pistol, or by administering to him poison, or," etc.

It will be noticed that section 1270 only declares that the form given in the appendix is sufficient in all cases where the forms there given are applicable, but it does not purport to be exclusive of other forms the pleader may choose to adopt. It does not declare the insufficiency of other forms, but merely the sufficiency of those contained in the appendix. We are, therefore, remitted to section 1268 to inquire whether the indictment contains "a statement of the acts constituting the offence, in ordinary and concise language, without repetition,

and in such manner as to enable a person of common understanding to know what is intended." This section was doubtless intended to modify to a certain extent the strictness of the common law indictment, and simply to require the statement of the elements of the offence in language adapted to the common understanding of the people, whether it would be regarded as sufficient by the rules of the common law or not. *People* v. *Dolan*, 9 Cal. 576; *People* v. *Ah Woo*, 28 Cal. 205; *People* v. *Rodriguez*, 10 Cal. 50. As was said by this court in *United States* v. *Cruikshank*, 92 U. S. 542, 558, "the object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

The indictment in this case, omitting the immaterial parts, avers that the accused "did unlawfully, wilfully, knowingly, feloniously, purposely, and of deliberate and premeditated malice, make an assault upon one Samuel Roberts," and a certain loaded revolver "then and there feloniously, purposely and of deliberate and premeditated malice did discharge and shoot off to, against and upon the said Samuel Roberts," and one of the bullets aforesaid, discharged as aforesaid, "feloniously, purposely and deliberate and premeditated malice did strike, penetrate and wound him, the said Samuel Roberts, in and upon the right breast, . . . one mortal wound, of which he, the said Samuel Roberts, instantly died;" and further, that the defendants "did then and there kill and murder the said Samuel Roberts in the manner and form aforesaid, contrary," etc.

Defendant criticises this indictment as failing to aver deliberate and premeditated malice in killing Roberts, although it is averred that the defendants did, with deliberate and premeditated malice, inflict a *mortal* wound, of which he instantly died, and that they killed and murdered him in the manner and form aforesaid. If, as alleged in the indictment, they, with deliberate and premeditated malice, shot Roberts in the breast with a

revolver, and inflicted a mortal wound, of which he instantly died, they would be presumed to contemplate and intend the natural and probable consequences of such act; and an additional averment that they, with deliberate and premeditated malice intended to kill him, was quite unnecessary to apprise the common understanding of their purpose. If they purposely inflicted a mortal wound, they must have intended to kill. No person could have a moment's hesitation as to what it was intended to aver, namely, that the defendants had been guilty of a deliberate and premeditated murder; and while a number of cases are cited which lend some support to the argument of the defendant, there was no such statute involved as section 1268 of the Oregon Code. We have no doubt the indictment furnished the accused with such a description of the charge as would enable him to avail himself of a plea of former jeopardy, and also to inform the court whether the facts were sufficient in law to support a conviction, within the ruling in the *Cruikshank case*. While we should hold an indictment to be insufficient that did not charge in definite language all the elements constituting the offence, we have no desire to be hypercritical or to require the pleader to unduly repeat as to every incident of the offence the allegation of deliberateness and premeditation. We are bound to give some effect to the provisions of section 1268 in its evident purpose to authorize a relaxation of the extreme stringency of criminal pleadings, and make that sufficient in law which satisfies the "common understanding" of men.

3. Certain exceptions to the admission of testimony render it necessary to notice the more prominent facts of the case. The murder took place at Dyea, Alaska, just outside the cabin of Roberts. Roberts conducted certain games at the Wonder Hotel or saloon, and slept in his cabin across the street, about a hundred and fifty feet from the saloon. Ross and Brennan, two of the government witnesses, were employed by Roberts in connection with the games. Ross testified that, about two o'clock in the morning, Roberts, the deceased, asked the witnesses to accompany him from the Wonder Hotel to the cabin, and to carry a sack of money used at the games. Roberts was

in the habit of going to his cabin every night accompanied by a man carrying the sack. They entered the cabin, and, while Roberts struck a match, something suspicious seemed to occur, and both stepped outside the door. Instantly there was a report of a gun inside the cabin. Roberts crowded witness off the porch, the sack of money fell off witness's shoulder, and he fell off the steps. As he fell he heard the report of a pistol from outside the cabin, and soon heard hurried footsteps close to him. He then heard the report of a gun from inside the cabin, and in a few seconds a man came out, stood on the porch, raised his gun and fired two shots in the direction of the Wonder Hotel, turned to the right in a leisurely manner, got off the steps and disappeared behind the north side of the house. Witness recognized this man as Fitzpatrick, the defendant. As Fitzpatrick disappeared, witness called for help, and Brennan and others came over from the hotel with a lantern. Roberts was found lying on his back, fatally wounded, and almost immediately died.

Brennan, who was at the hotel, saw Roberts start with Ross, with the sack, to go to the cabin. In a few minutes he heard a shot, and started toward the door, but before he got to the door there was another shot, and, when he reached the pavement, still another, which seemed to come from the cabin. Witness ran back to the hotel, got a gun and lantern, ran across the street, found Ross first, and then Roberts on his back dying. There was some other testimony to the same general effect.

The testimony to which objection was made was that of Ballard, a soldier on guard duty at Dyea on the night of the occurrence, who testified that about two o'clock in the morning he heard four or five shots from the direction of Roberts' cabin and the Wonder Hotel, and that some fifteen or twenty minutes or half an hour thereafter, a man came to him. "I was in the cabin, and he rapped on the door, and I went and opened the door for him, and he said he would like to get a doctor. He was shot. . . . I directed him to the hospital in town, and he went that way." Witness said that he did not know the man, but was afterwards told that his name was Corbett. He was brought into court, but witness could not identify him with certainty.

Objection was also made to the testimony of Dr. Price, who swore that about three o'clock in the morning Corbett applied to him for medical assistance; that he was wounded in the right shoulder, and witness was in attendance upon him about three weeks or a month. Also to the testimony of John Cudihee, deputy United States marshal, who arrested Fitzpatrick, Brooks and Corbett the day of the murder, and made an investigation. He found Roberts in his cabin dead, then went to Fitzpatrick and Corbett's cabin, and found there a lot of shoes and clothing covered with blood. The witness produced the shoes in evidence, pointed out which pair was Fitzpatrick's and which was Corbett's, explained that Fitzpatrick had identified the shoes in his office, and pointed out which pair was Corbett's and which was his. Witness also pointed out the blood stains on both shoes. Corbett's shoe fitted the footprints in the sand which the witness found in the rear of Roberts' cabin, where the shooting occurred. The shoe had hobnails in it, and the heel of one was worn off so the print in the sand was a peculiar one.

Objection was made to the admission of any testimony relating to the acts of Corbett, and especially that which occurred after the alleged crime had been committed. No direct testimony appears in the record showing the presence of Corbett at the cabin before, during or after the commission of the crime for which Fitzpatrick was then on trial. Had the statement of Corbett, that he was shot, and inquiring for a doctor, tended in any way to connect Fitzpatrick with the murder, it would doubtless have been inadmissible against him upon the principle announced in *Sparf and Hansen* v. *United States*, 156 U. S. 51, that statements made by one of two joint defendants in the absence of the other defendant, while admissible against the party making the statement, are inadmissible against the other party. In that case declarations of Hansen connecting Sparf with the homicide there involved, tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. This is a familiar principle of law; but the statement of Ballard was not within this rule. Corbett had evidently been wounded, and was asking for a doctor. His accompanying statement that he was shot was clearly compe-

tent to explain his condition, and had no tendency whatever to connect Fitzpatrick with the transaction. This statement, as well as that of Dr. Price, to the effect that he found Corbett with a wound in his right shoulder, and that of Cudihee as to finding a lot of shoes and clothing covered with blood, and connecting one pair of these shoes with the footprints found near Roberts' cabin, were all facts connected with the crime which the government was entitled to lay before the jury. Fitzpatrick and Corbett roomed together. Their bloody clothes and shoes were found in their cabin the morning after the murder. Brooks had roomed with them. Brooks and Corbett in their affidavit for a continuance swore in effect that they were together that night, and attempted to establish a joint alibi.

There was no doubt that a homicide had been committed, and it was the province of the jury to determine whether the defendant was a guilty party. Any fact which had a bearing upon this question, immediate or remote, and occurring at any time before the incident was closed, was proper for the consideration of the jury. Of course, statements made in the absence of Fitzpatrick implicating him with the murder would not be competent, but none such were admitted; but any act done, whether in Fitzpatrick's presence or not, which had a tendency to connect him with the crime, was proper for the consideration of the jury, and the fact that Corbett was not then on trial is immaterial in this connection. As there was some evidence tending to show a joint action on the part of the three defendants, any fact having a tendency to connect them with the murder was competent upon the trial of Fitzpatrick. The true distinction is between statements made after the fact, which are competent only against the party making the statement, and facts connecting either party with the crime which are competent as a part of the whole transaction. In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed. It may have a bearing only against the party doing the act, or it may have a remoter bearing upon the other defendants; but such as it is, it is competent to be laid before the jury.

In *People* v. *Cleveland*, 107 Mich. 367, error was assigned by the defendant in permitting the prosecution to show the acts of one Mehan, jointly indicted with Cleveland in the affray; his appearance on the way to Jackson, and on the succeeding days; the excuse he gave for his then condition, and the result of an examination of his clothing. But the court said: "It is apparent from the testimony that the three parties, when they left Jackson, had arranged to engage in this robbery, . . . and the arrangement had been carried out so far as they were able to do so. It was therefore proper to show the condition of Mehan, who was not on trial, for the purpose of establishing his identity as one of the men who accompanied the respondent Cleveland from Jackson to Somerset Center, thus identifiying the latter's connection with the robbery."

So, in *Angley* v. *State*, 35 Tex. Crim. Rep. 427, error was assigned upon the admission of testimony to show the character of shoes Rice (who was connected with the transaction but not jointly indicted) had on when arrested the day after the assault. One ground of the objection was that Rice was not jointly indicted with Angley. When Rice was arrested and his shoes examined it was found that one of them had a hole in the sole fitting a corresponding peculiarity in the track found upon the ground. The court held this testimony proper, though Rice was separately indicted, because the conspiracy had been shown. This was a circumstance tending to show that he was one of the parties present at the time the assault was committed.

4. Error is also assigned in not restricting the cross-examination of the plaintiff in error. Defendant himself was the only witness put upon the stand by the defence, who was connected with the transaction; and he was asked but a single question, and that related to his whereabouts upon the night of the murder. To this he answered: "I was up between Clancy's and Kennedy's. I had been in Clancy's up to about half-past twelve or one o'clock — about one o'clock, I guess. I went up to Kennedy's and had a few drinks with Captain Wallace and Billy Kennedy, and I told them I was getting kind of full and I was going home, and along about quarter past one Wallace brought me down about as far as Clancy's, and then he took me down

to the cabin and left me in the cabin, and we wound the alarm clock and set it to go off at six o'clock, and I took off my shoes and lay down on the bunk and woke up at six o'clock in the morning, and went up the street."

On cross-examination the government was permitted, over the objection of defendant's counsel, to ask questions relating to the witness's attire on the night of the shooting, to his acquaintance with Corbett, whether Corbett had shoes of a certain kind, whether witness saw Corbett on the evening of March 12, the night preceding the shooting, whether Corbett roomed with Fitzpatrick in the latter's cabin, and whether witness saw any one else in the cabin besides Brooks and Corbett. The court permitted this upon the theory that it was competent for the prosecution to show every movement of the prisoner during the night, the character of his dress, the places he had visited and the company he had kept.

Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person, who takes the stand as a witness, should not be subject to cross-examination as other witnesses are. Had another witness been placed upon the stand by the defence, and sworn that he was with the prisoner at Clancy's and Kennedy's that night, it would clearly have been competent to ask what the prisoner wore, and whether the witness saw Corbett the same night or the night before, and whether they were fellow

occupants of the same room. While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury, *State* v. *Ober*, 52 N. H. 459; and it is also held in a large number of cases that when an accused person takes the stand in his own behalf, he is subject to impeachment like other witnesses. If the prosecution should go farther and compel the defendant, on cross-examination, to write his own name or that of another person, when he had not testified in reference thereto in his direct examination, the case of *State* v. *Lurch*, 12 Oregon, 99, is authority for saying that this would be error. It would be a clear case of the defendant being compelled to furnish original evidence against himself. *State* v. *Saunders*, 14 Oregon, 300, is also authority for the proposition that he cannot be compelled to answer as to any facts not relevant to his direct examination.

5. Error is also assigned to the action of the court in permitting the government to call and examine witnesses in rebuttal with respect to the effect of light from the flash of a revolver, and whether such light would be sufficient to enable a person firing the revolver to be identified. One of the witnesses, Ross, testified on cross-examination that although the night was dark, he identified Fitzpatrick by the flash of the pistol shots.

Had the defence put in no evidence whatever upon the subject, the question would have been presented whether it was or was not a matter of discretion for the court to admit this testimony in rebuttal; but in view of the fact that the defence put in a calendar apparently for the purpose of showing the time that the moon rose that night, as having some bearing upon this question, there was no impropriety in putting in this testimony.

There was no error committed upon the trial prejudicial to the defendant, and the judgment of the District Court is therefore

Affirmed.